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HAROLD B. WILLE

IN THE

Supreme Court of the United States

October Term, 1955

No. 710

ALLENTOWN BROADCASTING CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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February 23, 1956

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, Allentown Broadcasting Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 16, 1955.

OPINION BELOW

The opinion of the Court of Appeals, printed at page 1a of the Appendix hereto, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1955 (App. 6a). Petitioner's request for rehearing *en banc* was denied January 23, 1956 (App. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

1. Whether the majority of the Court below failed to comply with the mandate from this Court by perfunctorily reinstating the decision of the Federal Communications Commission in this case without a determination that it is supported by substantial evidence on the record as a whole, and thereby deprived Petitioner of a review of relevant questions of law necessary to decision.

2. Whether the judgment of the majority below affirming the decision of the Federal Communications Commission is contrary to the recent decision by another division of the same Court in *Clarksburg Publishing Company* v. *FCC*, — U.S. App. D.C. —, 225 F. 2d 511, holding that where, as in this case, an applicant for a broadcast franchise has existing interests in newspaper and other communications media in the same area, the Commission's award must be supported by reasoned findings based on evidence that the new service will further the public interest, convenience, and necessity despite the increased concentration of control of mass media which it will bring about.

STATUTES INVOLVED

Pertinent portions of the Communications Act of 1934, 48 Stat. 1084, 1085, 1093, as amended, 47 U.S.C. 308(b), 309(a), 309(b), and 402(g) provide as follows:

"§ 308 . . . (b) All applications for station licenses . . . shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. . . ."

"§ 309 (a) If upon examination of any application provided for in Section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

"(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . . Any hearing subsequently held upon such application shall be a

full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

"§ 402 . . . (g) At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by Section 10(e) of the Administrative Procedure Act." *

STATEMENT

This petition seeks review of the *per curiam* decision and order entered by the Court below on December 16, 1955, on remand from this Court, which affirmed a final decision of the Federal Communications Commission awarding a construction permit for a new standard broadcast station at Easton, Pennsylvania to Easton Publishing Company and denying the mutually exclu-

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* Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(e), provides in pertinent part as follows:

"Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case subject to the requirements of §§ 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

sive application of Petitioner for a new station on the same frequency at Allentown, Pennsylvania. The factual background of this lengthy proceeding is set forth in the opinion of this Court, decided June 6, 1955, reversing an earlier decision of the Court below* and remanding the case for a reconsideration of the record. *FCC* v. *Allentown Broadcasting Corporation,* 349 U.S. 358, 359-60.

In its previous review of this proceeding, this Court found two errors of law requiring reversal of the opinion of the Court below; and, of course, neither of these prior holdings by this Court is open to challenge here. First, this Court agreed with the Commission that it is not obligated, before invoking Section 307(b) of the Communications Act to favor an applicant proposing to bring a second local broadcast service to its community, to find the parties before it substantially equal in relative abilities to serve their respective communities. Second, this Court held that Judge Learned Hand's language construing this Court's decision in the *Universal Camera* case on remand,** quoted with approval by the Court below, went "too far". Having corrected these two errors of law, this Court remanded the case to the Court below, observing that "it is not our function to reinstate the determination of the Commission. That would make this Court the reviewing body of the ultimate determination of the Commission." 349 U.S. at 365.

On remand, the Court of Appeals, Prettyman and Miller, JJ., affirmed the Commission's decision *per*

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* *Allentown Broadcasting Corporation* v. *FCC,* 94 U.S. App. D.C. 353, 222 F. 2d 781, reversed, 349 U.S. 358.

** *NLRB* v. *Universal Camera Corporation,* 190 F. 2d 429, 430 (CA 2).

curiam, without further discussion of the issues on appeal or citation of authority, but with a terse finding of "no substantial error on the part of the Commission in the features of the case remaining open to our consideration". It is apparent from the decision on remand that the majority interpreted this Court's opinion so as to leave the Court below little room for further review of the Commission's decision.* Judge Bazelon disagreed, stating that he did "not read the Supreme Court's opinion to leave us with only the ministerial duty of reinstating the Commission's decision". In a carefully reasoned dissent, he pointed out that the Commission's decision contains nothing to show that it gave consideration to whether the public interest would be served by augmenting Easton's "near monopoly of communications media" despite the fact that this issue was "squarely presented" by Petitioner, and despite both the Commission's own policies and previous court decisions establishing the public good to be served by avoiding "concentration of control of the valuable electronic public domain". Judge Bazelon contended that the Commission's decision should be remanded for adequate findings on the evidence relating to Easton's ownership of other mass communications media.

On December 30, 1955, Petitioner filed a petition for rehearing *en banc* requesting the full Court to review the decision on remand because of the alleged failure of the majority to comply with the mandate of this Court and the inconsistency of the decision with the re-

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* This Court had observed that "[t]here was substantial evidence considering the whole record that had to be weighed, pro and con, as to types of programs, evasiveness of witnesses, and the desirability of allocating an additional license to an applicant who already controlled other means of communications". 349 U.S. at 363-4.

cent opinion of another panel of the Court in *Clarksburg Publishing Company* v. *FCC*, — U.S. App. D.C. —, 225 F. 2d 511. On January 23, 1956, this petition was denied, five to three, by the full Court in chambers, Chief Judge Edgerton and Circuit Judges Bazelon and Washington voting to grant the petition.

REASONS FOR GRANTING THE WRIT

1. The first question presented by this writ is whether the majority of the Court below failed to comply with the mandate from this Court directing it to reconsider the record in this case and the "ultimate determination" reached by the Commission. Such a review of the "ultimate determination" of the agency requires, under familiar principles, a judgment as to whether the decision is supported by adequate findings based on substantial evidence in the record as a whole, including the report of the Trial Examiner. *Universal Camera Corporation* v. *NLRB*, 340 U.S. 474. On remand from this Court, Petitioner was entitled to such a determination before the decision of the Commission could be reinstated. If no such determination was made, Petitioner has been denied the statutory right of review of "all relevant questions of law" presented to the reviewing Court and necessary to decision provided for in Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009(e).*

It is obvious that the original decision of the Court below which was reversed by this Court cannot constitute a finding that the Commission's decision is sup-

* By recent amendment, Congress made the review provisions of Section 10 of the Administrative Procedure Act specifically applicable to appeals from orders of the Federal Communications Commission. Act of July 16, 1952, 66 Stat. 718, 47 U.S.C. 402(g).

ported by substantial evidence. For, even though viewing the case under a mistaken apprehension of controlling law, the Court below found the Commission's decision unsupported by substantial evidence in at least three areas—uncertainty as to program plans, lack of forthrightness of the Easton applicant, and monopoly and concentration of communications media. 94 U.S. App. D.C. 353, 356, 222 F. 2d 781, 784. This Court's subsequent holding that the Commission was not required to make comparative findings on the relative abilities of the applicants did not automatically overturn the conclusion below that the Commission's decision is deficient in these respects. Even in uncontested applications, the burden of proof on all matters in issue is placed by Section 309 of the Communications Act upon the applicant. Indeed, the Commission in the past has denied applications, on a non-comparative basis, where the applicant has failed to set forth an acceptable program proposal,* or where he has engaged in misrepresentation to the Commission** or in monopolistic practices.***

Just as clearly, this Court's opinion reversing the Court below does not supply the necessary holding that the Commission's decision in this case finds support in the record as a whole. This Court has repeatedly refused "to review an administrative record in the first instance after a finding that a lower court has applied

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* *E.g., Simmons* v. *FCC*, 83 U.S. App. D.C. 262, 169 F. 2d 670, cert. denied, 335 U.S. 846. Compare *Plains Radio Broadcasting Company* v *FCC*, 85 U.S. App. D.C. 48, 175 F. 2d 359.

** *E.g., FCC* v. *WOKO, Inc.*, 329 U.S. 223.

*** *E.g., Mansfield Journal Company* v. *FCC*, 86 U.S. App. D.C. 102, 180 F. 2d 28.

an incorrect principle of law";* and (as the dissent below points out) if it had departed from its usual practice in this case there would have been no occasion for remand to the Court below for a review of the Commission's "ultimate determination". In *NLRB* v. *Pittsburgh S.S. Company,* 340 U.S. 498, this Court conferred a broad power, and a correlative duty, on circuit courts vested with exclusive jurisdiction to review the actions of administrative tribunals in accordance with the standards required by the Administrative Procedure Act and *Universal Camera* case, and emphasized that this Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would be finding the record tilting one way rather than the other . . ." 340 U.S. at 503. The Court below could not reasonably have assumed that this Court's opinion constituted a holding that the Commission's ultimate decision in this case to prefer Easton to Petitioner was correct in view of the record as a whole.

On remand, it became the duty of the Court below to pass on all issues not encompassed within this Court's mandate. *Sprague* v. *Ticonic National Bank,* 307 U.S. 161. And while the Court below could undoubtedly have reversed on remand its earlier holdings that the Commisson's decision could not be supported in at least three respects, see *Christoffel* v. *United States,* 94 U.S. App. D.C. 168, 214 F. 2d 265, cert. denied, 348 U.S. 850, nothing in the *per curiam* decision below indicates that it did so. The decision below, brief as it is, contains no hint that the majority

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* *United States* v. *Great Northern Railway Company,* 343 U.S. 562, 578; accord, *NLRB* v. *American National Insurance Company,* 343 U.S. 395. Compare *McAllister* v. *United States,* 348 U.S. 19, 23 (dissenting opinion of Mr. Justice Frankfurter).

of the Court addressed itself to a full consideration of the evidence in the record and the Commission's findings in the light of the two errors of law found by this Court in its earlier opinion. Although this Court specifically directed a "reconsideration of the record", the *per curiam* opinion below merely recites that the case was remanded for "proceedings not inconsistent" with the opinion of this Court, and that the majority could find no substantial error in those aspects of the case "remaining open for consideration". This restrictive interpretation of the mandate of this Court, indicating a conviction by the majority below that its duties on remand were narrowly circumscribed to ministerial reinstatement of the Commission's decision, ignores both errors of law in the Commission's decision which had previously been noted below and were not disturbed by this Court, and remaining questions left open for decision by the mandate.

The majority below also failed to comply with the mandate in this case since it ignored, or reversed *sub silentio*, the earlier holding, left undisturbed by this Court on review, that the Commission committed legal error in assuming that its power independently to review trial examiners' credibility findings is broader where these involve conflicts within the testimony of a single witness rather than contradictory statements by different witnesses.* The *per curiam* opinion on

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* The Commission justified its independent evaluation and rejection of the Examiner's credibility findings in this case largely

> "because of the . . . fact that the Examiner's findings were primarily based on her evaluation of testimony by one witness rather than on her judgment as to the credibility of different witnesses who made contradictory statements." (R. 205).

The Court below held this analysis to be legally erroneous, as follows:

remand ignores this earlier finding of legal error in the Commission's decision, which clearly remained after the opinion of this Court. If this is so because of a conclusion by the majority on remand that the error was not prejudicial, Petitioner was entitled to such a finding. *United States* v. *Urbuteit,* 336 U.S. 804. If, on the other hand, the Court below (without saying so) reversed its earlier determination of legal error by the Commission on this point, then its decision is squarely in conflict with decisions of other circuits, one of which characterizes the test applied by the Commission as "an ancient fallacy". *NLRB* v. *Howell Chevrolet Company,* 204 F. 2d 79, 86 (CA 9), affirmed, 346 U.S. 482. In either case, the decision of the Court below should be reversed and remanded for further consideration of these important questions.

2. Apart from its failure to comply with the mandate of this Court, the judgment of the majority below affirming without further findings the decision of the Commission raises a question vital to the administration of the Communications Act which has not heretofore been decided by this Court. Its resolution at this time is all the more urgent because of the significant division among different panels of the Court below as to the duty of the Commission when granting broadcast licenses to applicants who come

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"we cannot agree that the Examiner's findings are entitled to any less weight than findings which resolve a conflict between witnesses. Both involve a determination based upon an evaluation of the witnesses' demeanor, bearing and delivery; and it has been specifically held that the undocumented testimony of a single witness may be rejected on the basis of such factors, and that this is a judgment best made by the trier of fact who 'had the witnesses before it . . .' " (R. 319).

This Court's opinion left this holding undisturbed.

before it freighted with existing interests in other media of mass communications. This division is apparent not only from the dissent by one of the three judges on remand, but from the five to three division of the full Court below on Petitioner's request for rehearing *en banc*. Since the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to hear appeals taken under Section 402(b) of the Communications Act, disagreement as to the Commission's function among different panels of this Court assumes an importance similar to conflicts among different circuits over the administration of other important federal statutes, and jeopardizes the uniform administration of the Act. Intra-circuit divisions of the Court below on matters relating to the Communications Act are thus particularly appropriate subjects for the exercise of that Court's discretionary power to grant rehearings *en banc*. See *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 270 (concurring opinion of Mr. Justice Frankfurter).

The problem inherent in the disposition of this case by the Court below may be stated as follows: when an applicant with existing communications interests is before the Commission and no comparison of his relative merits with those of another applicant is necessary, is the Commission's duty at an end when it finds that he possesses the basic legal, technical, and financial qualifications required of all broadcast licensees, without a further appraisal of those aspects of his application, such as his interests in other communications media, which, although not in themselves disqualifying, may in certain circumstances outweigh the public good to be gained from the new broadcast service proposed? The recent opinion of one division of the Court below in

Clarksburg Publishing Company v. *FCC*, — U.S. App. D.C. —, 225 F. 2d 511 (which this Court was not asked to review) answers this question in the negative. The summary affirmance of the Commission's decision in this case by another division of the Court below after the holding of this Court that the Commission was not obliged to make a comparison of the respective abilities of Petitioner and Easton Publishing Company, answers it in the affirmative. This is so because, in affirming *per curiam* the Commission's decision, the Court below has necessarily condoned its conclusions that the near monopoly in communications interests possessed by the Easton applicant, and urged by Petitioner as an independent ground for denial of the Easton application, is not of significance in this case absent the necessity of a comparative evaluation by the Commission of Petitioner and Easton, and in view of the fact that newspaper ownership as such is not a statutory disqualification.

In *Clarksburg* the Court below, in a unanimous decision by Circuit Judges Edgerton, Bazelon and Bastian, held that where application is made for a new broadcast station by a party with extensive newspaper and other broadcast interests in the same area as that for which the new franchise is sought, and it is urged that a grant of the application would abet an existing monopoly in mass communications contrary to the public interest, the Commission cannot grant the application merely by a determination that the applicant meets the legal, technical, and financial specifications of the Act, but must instead consider at a full hearing the effect of the concentration of control alleged, and render a reasoned decision that the grant will nevertheless serve the public interest. The ra-

tionale of the decision is plain and readily understandable. It goes on the assumption that the Commission is not merely a licensing agency required to issue franchises to all who come before it possessed of the minimum qualifications, such as citizenship, required by Section 308(b) of the Act to be set forth in every application; but rather that the Commission must make a further finding, after these minimum requirements have been demonstrated by the applicant, that a grant of the application will serve the public interest, convenience, and necessity. Highly relevant to the latter finding, required by Section 309 of the Act, is the effect which an additional outlet of mass communication will have in a given area where it is granted to an applicant who already controls a number of such outlets. The ownership of other media, when challenged, places an additional burden on the applicant, under Section 309(b), to demonstrate that the authorization he seeks will further the public interest. In this case both the Commission and the majority of the Court below on remand failed to recognize this higher standard.

This Court has recognized in another connection that the public weal is served by "the widest possible dissemination of information from diverse and antagonistic sources",* and the Commission has said that an underlying purpose of the Communications Act "was the desire to effectuate the policy against the monopolization of broadcast facilities . . . ."**

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* *Associated Press* v. *United States*, 326 U.S. 1, 20.

** *Amendment of Multiple Ownership Rules*, 9 Pike and Fischer, Radio Regulation 1563, 1568. The Court below has repeatedly endorsed the principle of diversification of ownership interests in mass media of communications as applied by the Commission. See, *e.g.*, *Scripps-Howard Radio* v. *FCC*, 89 U.S. App. D.C. 13, 189 F. 2d

The *Clarksburg* decision, handed down by a division of the Court below different from the majority on remand of this case, represents a recent delineation of the Commission's function in enforcing diversification of broadcast media as "an important component of the public interest". In *Clarksburg,* as in this case, the Commission had attempted to justify its grant of a new station to a party already in control of numerous mass media in the area by arguing that the applicant was not disqualified in an absolute sense under the statute by reason of its newspaper interests. The Court explicitly struck down such a justification for the Commission's award. 225 F. 2d at 519n. But, as pointed out in the dissent below, the Commission's decision here rests on just such a determination.* The Commission in this case treated the ownership of newspaper and other broadcast interests in Easton by the Easton applicant as relevant only to the extent that the record might demonstrate past unlawful monopolistic conduct in the operation of these media. Such conduct, if shown, would of course be highly relevant and in the absence of countervailing circumstances would constitute a bar to a grant of the application. *Mansfield Journal Company* v. *FCC,* 86 U.S. App. D.C. 102, 180 F. 2d 28. But the Commission's duty did not end with its finding that the record did not support a conclusion that Easton had engaged in

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677, cert. denied, 342 U.S. 830; *McClatchy Broadcasting Company* v. *FCC,* — U.S. App. D.C. —, — F. 2d —, 13 Pike and Fischer, Radio Regulation 2067 (decided January 27, 1956).

* On the "diversification" issue, the Commission said "Newspaper control . . . does not automatically disqualify an applicant . . . [W]e are convinced that the Easton Publishing Company is not disqualified solely because of its newspaper ownership and activities . . ." (R. 207).

monopolistic practices. Rather, under the rule of the *Clarksburg* case and consistent with the diversification policy of the statute, the Commission had an obligation to weigh, not only the past practices but also the "potential evil" of the increased concentration of communications interests which its decision would bring about. The dissent in the judgment below makes it clear that the Commission did not do this. The majority's reinstatement of its decision can only mean that in the opinion of the majority it was not required to do this.

The conflict of opinion in the Court below which is squarely presented by a comparison of *Clarksburg* and the *per curiam* decision and order in this case is of far-reaching significance in the administration of the Act, and of critical importance to persons contemplating the substantial investments in time, effort, and money which are frequently involved in obtaining a broadcast permit.*

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* The second problem raised by this *certiorari* was most recently illustrated in *Pinellas Broadcasting Company* v. *FCC*, — U.S. App. D.C. —, — F. 2d —, 13 Pike and Fischer, Radio Regulation 2058 (decided January 19, 1956). In that case, Judges Prettyman and Washington upheld an award of a construction permit for a new television station to the publisher of one of two daily newspapers and the licensee of one of two radio stations in Tampa, Florida. Judge Bazelon dissented, in language similar to his dissent in this case below, arguing that the case should be remanded for the required finding, under *Clarksburg*, of the effect which the grant would have upon the concentration of control and diversification of mass media of communications in the Tampa area.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for *certiorari* should be granted.

Respectfully submitted,

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February 23, 1956